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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 766

DUNCAN MILLER,

Petitioner,

v.

SHELL OIL CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Your petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals, for the Tenth Circuit.

OPINIONS BELOW

The Court of Appeals and District Court did not write an opinion.

JURISDICTION

A timely petition for rehearing en banc was denied on July 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner could have his property taken away from him, pursuant to a legal action in a State Court that was fraudulently withheld from him; and whether, pursuant to the 5th Amendment to the Constitution of the United States, various hamstringing evasions by the respondent in this case, which were permitted to remain in the record, unresolved, constitute a denial of petitioner's Constitutional rights.

STATUTES, REGULATIONS AND CONSTITUTIONAL PROVISIONS INVOLVED

The Federal Mineral Leasing Act of 1920, as amended, 30 U.S.C. Sec. 181 *et seq.* The Federal Rules of Civil Procedure pertaining to discovery, judgment on the pleadings, and summary judgment. The 14th and 5th Amendments to the Constitution of the United States.

STATEMENT

Petitioner-plaintiff filed the Complaint in the Federal District Court at Albuquerque, New Mexico in substance alleging conspiracy and fraud in taking petitioner's property (money), from his bank account, through the device of a State of New Mexico District Court, Chavez County, Action, which respondent-defendant fraudulently concealed from petitioner.

Under Count 2, plaintiff alleged monopolistic wrong-doing under the Federal Mineral Leasing Act, on the Public Domain.

The defendant moved for dismissal which was granted by the District Court. An amended supplemental complaint was filed after dismissal of the Complaint.

On appeal the Appellate Court reversed the decision.

After remand, defendant again moved for dismissal and summary judgment (R. 29), attaching various documents from the Chavez County Court action. Among these was an affidavit for publication (R. 40). Plaintiff moved for judgment on the pleadings. The District Court denied all motions.

The defendant purported to answer the Complaint (R. 87). At R. 89, paragraph 10, it said: "answering paragraphs, numbered 10, 11, 12 of the Supplemental Complaint." But this was decietful. See: R. 14, 15 (said paragraphs) and compare with answer.

Various interrogatories and requests for admission of facts were submitted to the defendant-respondent to most of which the response was evasive and unmitigated evasion.

The case went on despite defendant's derelictions to an ultimate decision dismissing the complaint; with the District Court ignoring the combined series of motions (R. 149), which delineated the apparent evasions *and*, most important, specifically, as to the allegations of the Complaint in said Paragraphs 10, 11, 12. Most of the motions involved were the kind ordinarily ruled on without oral argument, however, defendant did appear and made evasive, misleading and absurd arguments (R. 172-84), but the Court granted defendant's motion for a cost bond.

The defendant-respondent at its leisure was permitted to compose orders for the Court in the proceedings prior to the first appeal. Plaintiff pointed out that the defendant took advantage of this trust, by delaying and using the time element involved to jeopardize the timeliness of the Notice of Appeal, then moving to dismiss appeal (R. 77, line 10). Respondent has refused to make any definitive explanation of the above inferences from stated facts.

After notice of appeal was filed in the District Court (on the second appeal), orders were made extending the time to docket the record with the appellate court (R. 168-71). Meanwhile, the rules of the Court of Appeals were changed, and through various inadvertencies, the record on appeal was not delivered to petitioner-appellant until after the case was decided, hence he was unable to correlate his briefs on appeal with the record in and from the District Court, and the Appellate Court affirmed the District Court. A petition for rehearing en banc was denied July 27, 1967.

REASONS FOR GRANTING THE WRIT

The statement of the case is surely shocking as this Court must agree, but it is factual; it is an honest statement, and it shows fraud upon the part of the respondent. Petitioner could fill page after page with citations, condemning such practices. The following is one in point:

> "Fraud" includes anything *calculated to deceive*, whether it be a single act or combination of circumstances, whether suppression of truth or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth or by look or gesture. (Emphasis supplied.) *Gibbons v. Brandt*, 170 F.2d 385, C.C.A. Ill. (1948).

The affidavit to the State Court for publication of Summons (R. 40) was fraudulent, as shown by exhibits (R. 22-24), because these exhibits prove and proved that plaintiff was communicating with the defendant's officers, by telegram, telephone and letter; but at the very same time the fact that it had a legal action (lawsuit) pending in said Court against plaintiff was withheld from him, by *calculated deceit*, during said communications. This was about the precise time (within a few weeks) prior to said affidavit, which professed no knowledge of petitioner's "whereabouts".

Since it is under the above circumstances, that respondent got away with petitioner's money and since the Federal Con-

stitution guarantees against such depredeations, this then, is reason alone to grant the writ.

This Court has held in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314, 208 S. Ct. 410:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality, is Notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In the Federal District Court, after engaging in a fraud in the State Court, that resulted in a violation of the 14th Amendment to the Constitution of the United States, the respondent did the same thing with respect to the 5th Amendment, by its evasions.

Plaintiff's lawsuit never got off the ground, with respect to Count 2. Defendant evaded and then evaded its evasions with respect to the key allegations of the Complaint as documented, *supra*. If respondent can show that the foregoing statement is not true plaintiff will gladly withdraw his petition.

CONCLUSION

On Count 1 in the District Court, petitioner had all the elements necessary for Summary Judgment proven; said Exhibits proved the allegations of the Complaint.

On Count 2, because of the evasions, the case should be remanded to the District Court for further proceedings, and for Count 1, reversed and remanded with instructions to grant Summary Judgment for petitioner.

Respectfully submitted,

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Petitioner pro se

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

OBJECTION TO PETITION

1. A copy of the petition filed in this Court was received by respondent on the 6th day of November, 1967, together with a notice of the docketing of such petition on the 25th day of October, 1967. Such notice and copy of the petition were sent via regular mail contrary to the requirements of Rule 33 of this Court.

2. The petition does not designate the date of the order, judgment or decree sought to be reviewed, and the time of its entry, contrary to Rule 23 1 (b) (i) of this Court.

3. The petition does not comply with the requirements of Rule 23 1 (i) in that there is not appended thereto a copy of the order, judgment or decree sought to be reviewed.

4. The petition does not specify the date and terms of the order granting an extension of time within which to petition for certiorari contrary to Rule 23 1 (b)(ii) of this Court.

5. The petition does not show the basis for federal jurisdiction in the Court of first instance contrary to Rule 23 1 (g) of this Court.

6. Petitioner has failed to comply with Rule 21 of this Court requiring notice to respondent of the contents of the transcript of the record in this case certified to this Court.

7. Petitioner has not, within the contemplation of Rule 19 of this Court, shown any special and important reason for a review of this matter on writ of certiorari.

II

ARGUMENT IN OPPOSITION TO REVIEW ON CERTIORARI

Inasmuch as Petitioner is a resident of the State of Nevada (R. 1), Respondent, pursuant to Rule 11 (a) of the rules of the United States District Court for the District of New Mexico, filed therein its motion (R. 105) for an order directing petitioner to furnish sufficient security for respondent's costs. At a hearing conducted thereon held December 13, 1965, the District Court entered its order (R. 152-153) stating:

> "This matter coming on for hearing this date upon various motions pending relative to depositions, entry of default, and security for costs, and plaintiff not appearing and defendant appearing by its attorney, and it appearing to the Court that plaintiff has twice failed to appear for depositions and has never made a personal appearance in court or at any hearing in connection with this matter, and the cause being scheduled for trial on December 30, 1965, at Santa

> Fe, New Mexico, at 9:00 o'clock A.M., and it appearing to the Court the matter being a non-jury trial can best be expedited and handled by proceeding with the trial of the case, and reasonable cause appearing for the defendant's motion for security for costs; Now, Therefore,
>
> "IT IS BY THE COURT ORDERED that the plaintiff shall file with this Court an appropriate bond in accordance with the Rules of this Court in the sum of $1,000.00 for security for defendant's costs, said bond to be filed by December 27, 1967, failing in which the action will be dismissed, and all motions and notices to take depositions are denied and the case will come on for trial as scheduled, providing plaintiff has furnished a security for costs bond as required by this order."

Petitioner failed to comply with such order and further failed to appear either in person or by counsel for the trial set for December 30, 1965. (R. 185-186). The District Court, in announcing its decision in the action, stated:

> "The Court having received no – nothing in response to the order of the court requiring the cost bond, and further, the date scheduled for trial having come, the plaintiff not appearing in person or by an attorney, having never appeared in this jurisdiction, having never appeared in person or by an attorney in this Court, the Court further finding that, on the basis of all the evidence submitted, I probably should have given you summary judgment quite awhile ago, Mr. Hannahs, but out of an abundance of caution, carried the matter on up on this time, but I think it amounts to an abuse of process, by now."

and on January 6, 1966, entered its order (R. 162) stating:

> "This matter came on for trial before the Court sitting at Santa Fe, New Mexico, on the 30th day of December, 1965, the defendant appearing by its attorneys, Seth, Montgomery, Federici & Andrews, and Fred. C. Hannahs, and the plaintiff not appearing although due notice of such trial setting was given the plain-

tiff, and the plaintiff having never appeared in person or by an attorney at any time during the pendency of this cause, and it further appearing to the Court that the plaintiff failed to comply with the Order of the Court entered December 13, 1965, requiring the plaintiff to file a $1,000.00 cost bond on or before December 27, 1965, and said order having provided that the cause would be dismissed unless a cost bond was filed; Now, Therefore,

IT IS BY THE COURT ORDERED, ADJUDGED AND DECREED that the complaint be, and the same is hereby dismissed with prejudice and it is ORDERED that the defendant recover its costs herein."

Thereafter, petitioner prosecuted his appeal from the foregoing order to the United States Court of Appeals, Tenth Circuit, docketed therein as Cause No. 9110, which Court, following hearing at which petitioner also failed to appear, on May 24, 1967 entered the following order:

"This appeal is taken from an order of the United States District Court for the District of New Mexico dismissing appellant's case with prejudice for continued abuse of process. The record fully supports the judgment and appellant has failed to appear in this court and his appellate brief is totally unresponsive to the issues. The judgment is accordingly affirmed."

Petitioner, in his briefs filed with the Tenth Circuit Court of Appeals neither challenged nor discussed the trial court's order (R. 152) requiring the cost bond nor the trial court's dismissal (R. 162) of his complaint for failure to comply with such other order. Similarly, the petition herein is not addressed to and does not seek a review of the basis of the decision of the Tenth Circuit Court of Appeals affirming the trial court but seeks only a review of matters which were never passed upon by either the trial court or the Tenth Circuit Court.

Although the petition here appears to concern certain allegations of the petitioner's complaint (R. 1) and First

Amended and Supplemental Complaint (R. 14) alleging fraud, conspiracy and monopolistic practices on the part of the respondent, petitioner did not appear at any stage of the proceedings and did not introduce any evidence at all. Petitioner, therefore, should not be heard to complain.

CONCLUSION

We submit that petitioner has had more than adequate opportunity to have his day in court and that the petition for writ of certiorari be denied.

Respectfully submitted,

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